appellant against repairs of the existing building in view of the extensive repair which will be involved. After inspecting the building he felt that not only a certain portion of the building required repair but also other portions of the building. He stated that all the repairs required by the Municipality were necessary. He further testified that the present condition of the building was unsafe and risky to the tenants of the premises. In his report (D. 2) he expressed the opinion that repairs required by the Municipality amount to a total reconstruction of the premises. Considering the evidence that the learned magistrate had before him I think he was justified in arriving at the conclusion that primarily what he had to consider was whether or not the abatement order should be made and had properly found that there was ample evidence to show that the repairs required by the Municipality were necessary to abate the nuisance. In the particular circumstances of this case I am of the opinion that the learned magistrate had not erred in law when he found that this was a fit and proper case for making an abatement order.

As regards the second ground I am of the opinion that the proceedings which preceded the making of the abatement order were not wrong in law. In *Re Chung Lit and Chung Ah Kam*,[1] a case cited before me, it was apparent that a summary abatement order was made after the landlord of the premises was found guilty of default to comply with the nuisance notice under section 246 of the Municipal Ordinance. The power to make such summary order is I think clearly provided under section 247 of the Municipal Ordinance. It seems to me that pursuant to that section the magistrate was empowered to make a summary abatement order against any person who is convicted on a summons for default of a nuisance notice on complaint made by the commissioners or pursuant to a separate application by the commissioners for an abatement order under section 246. Whilst sub-section (15) of section 247 provides that a summons under that section may be in Form G in Schedule A it does however allow that variations be made as the circumstances require. In the present case the complaint, the summons for default of nuisance notice and the fact of the conviction for such default was already before the court and it was therefore proper for the learned magistrate after notifying the appellant of his intention to make such order to proceed making a summary abatement order after hearing the evidence, if any, which may be adduced to show cause why such order should not be made. The proceedings which preceded the making of such order in the instant case were in form and substance part of the proceedings for default. In my opinion an abatement order made after conviction of the appellant in that proceedings was perfectly regular. Further I am of the opinion that there is nothing to prevent the learned magistrate from proceeding summarily to make an abatement order on conviction of the appellant even without notice. The fact that a notice was issued has not I think provided a valid ground for saying that the proceedings were wrong in law. For this reason, I find that the learned magistrate did properly exercise his summary power provided by law under section 247 of the Municipal Ordinance when he made the abatement order.

The appeal is therefore dismissed.

Appeal dismissed.

Solicitors: *Skrine & Co.*

KIAN ANN & CO. v. MALAYAN RAILWAY ADMINISTRATION

[O.C.J. (Ibrahim J.) September 6, 1970]

[Kota Bharu — Civil Suit No. 57 of 1967]

Carriers — Railways — Carriage of goods — Goods transported at owner's risk — Goods of perishable nature — Wilful misconduct — What constitutes.

Railways — Carriers — Goods transported at owner's risk — Railway Ordinance, 1948, s. 67(2).

This was a claim for damages arising from the delay in the delivery of a consignment of onions transported by the defendant's train. The consignment was at owner's risk and the agreed issue was whether there was wilful misconduct on the part of the defendants or their servants. The plaintiff alleged that there was wilful misconduct in that the defendants or their servants forwarded the consignment from Taiping by a slow goods train, knowing that it contained onions which were goods of a perishable nature. The onions when delivered were found to be in a rotten state.

Held: in the surrounding circumstances of this case, wilful misconduct had been proved against the defendant's servant at Taiping when he forwarded the consignment containing the onions by a slow goods train. When he did so he had acted recklessly, quite regardless of whether the onions would rot or not.

Cases referred to:-

(1) *Lewis* v. *Great Western Rly. Co.* (1877-8) 3 Q.B.D. 195.

(2) *Forder* v. *Great Western Rly. Co.* [1905] 2 K.B. 532.

(3) *H.C. Smith Ltd.* v. *Great Western Rly. Co.* [1922] 1 A.C. 178.

CIVIL SUIT.

A. Wilson for the plaintiffs.

J. Puthucheary for the defendants.

Cur Adv. Vult.

Ibrahim J.: The plaintiffs' claim against the defendants in this action is for damages arising from the delay in the delivery of a consignment of onions transported by the defendants' train in CG 4243. The consignment was "at owner's risk" and the agreed issue is whether there was wilful misconduct on the part of the defendants or their servants for regulation 30(b) of the Malayan Railway Administration Tariff Book Chapter II which substantially reproduces section 67(2) of the Railway Ordinance No. 8 of 1948 provides that:

"If, ... goods are agreed to be conveyed at owner's risk, the Railway Administration shall not be liable for loss, damage, deviation, misdelivery, delay or detention thereof except upon proof that the same arose from the wilful misconduct of the Railway Administration or its servants."

Several particulars of misconduct were alleged in the plaintiffs' statement of claim but at the hearing the plaintiffs confined themselves to only one, *i.e.*, "forwarding the said CG 4243 from Taiping station by a slow goods train, knowing that it contained onions which were goods of perishable nature."

The plaintiffs were wholesalers of sundry goods at No. 142, Jalan Dato Hamid, Pasir Mas, and according to their managing partner (P.W. 1) a Chop Chye Hin in Penang had been supplying onions and other goods to them since six years ago. These goods were invariably sent by the defendants' train. On 8th February 1967 the said Chop Chye Hin as agents of the plaintiffs had sent 740 baskets of onions by defendants' train from Bukit Tengah Railway Station in Province Wellesley to Pasir Mas Railway Station on consignment note No. 99320 in CG 4243. The consignment was "at owner's risk" and copy of the consignment note is at page 15 of A (the Agreed Bundle of Documents). The onions were loaded together with some other goods as mentioned in the consignment note at 12.30 p.m. on 8th February 1967 but they did not arrive at Pasir Mas Railway Station until the afternoon of 17th February 1967, *i.e.* after a lapse of 9 days. Normally a consignment from Bukit Tengah would take only 4 days to arrive at Pasir Mas and 4 days after the onions had left Bukit Tengah he asked the station master to find out where the consignment was. He also informed the station master that the onions in the CG would rot after 7 days. The station master sent a telegram to find out but he could not tell him where the CG was until it arrived on 17th February 1967.

On arrival he had the CG opened and found that the onions were in rotten state. He informed the station master about it and the station master contacted Inche Osman bin Yassin (P.W. 2), the defendants' commercial representative in Kuala Krai, who came and examined the onions on the same day. He engaged labourers to open the baskets and separate the good from the bad onions. The good ones were only 42 pikuls and the weight of the rotten ones was 121 pikuls 35 katties. Cost price at $40 per pikul of the bad ones was $4,840 and his profit on the bad onions at $3 per pikul would have been $363. He spent $150 to separate the onions and to dispose of the bad ones. The total amount of damages he is claiming is therefore $5,353.

The onions were the small red Indian onions which were classified as perishable goods and according to him because the CG was sealed they would start rotting after about 7 days and if the CG had been sent by a fast goods train from Taiping they would not have rotted. Normally green labels would be attached to both sides of CGs carrying perishable goods on which would be written the nature and quantity of the goods. For non-perishable goods white labels would be used.

On 26th February 1967 he wrote to the defendants regarding the matter and a reply thereto was received by him dated 20th March 1967. There were further correspondence between them. The defendants' letter dated 7th April 1967 disclosed that the delay was due to the wagon axle being first detected to be "running hot" and thus becoming defective at Taiping on the night of 9th February 1967 and after repair on the following day the wagon was forwarded by slow goods train.

P.W. 2 substantiated P.W. 1's evidence. According to him he found that 80% to 85% of the onions had deteriorated when he examined them after they were unloaded from the CG to the ground. As far as he knew onions were perishable goods and wagons carrying perishable goods would have green labels attached to them with the word 'perishable' embossed across the labels in black. This would indicate to the railway employees that the goods had to be sent expeditiously. On the labels the date of loading and nature of the goods would also be noted. In case of non-perishable goods white labels would be used.

There were various categories of goods trains. They were the fast and the slow goods trains, the mixed trains and the special goods trains. For the long distance consignment of perishable goods the fast goods train would be used and such train would arrive at Pasir Mas every day at about 6 or 7 a.m. Normally it would take 4 days for it to arrive at Pasir Mas from Bukit Tengah. The slow goods train would take a week or more from Bukit Tengah to Pasir Mas arriving there every day except on Sundays.

The defendants did not call any witness but submitted that no evidence had been adduced by the plaintiffs from which wilful misconduct on the part of the defendants or their servants could be inferred.

On what is wilful misconduct Bramwell L.J. in *Lewis* v. *Great Western Railway Company*[1] at page 206 said:

> "There is such a mass of authorities to shew what 'wilful misconduct' is, that we should hardly be justified, as a Court of Appeal, in departing from them, even if we thought them to be wrong. 'Wilful misconduct' means misconduct to which the will is a party, something opposed to accident or negligence; the misconduct, not the conduct, must be wilful. It has been said, and, I think, correctly, that, perhaps, one condition of 'wilful misconduct' must be that the person guilty of it should know that mischief will result from it. But to my mind there might be other 'wilful misconduct.' I think it would be wilful misconduct if a man did an act not knowing whether mischief would or would not result from it. I do not mean when in a state of ignorance, but after being told, 'Now this may or may not be a right thing to do.' He might say, 'Well, I do not know which is right, and I do not care; I will do this.' I am much inclined to think that that would be 'wilful misconduct,' because he acted under the supposition that it might be mischievous, and with an indifference to his duty to ascertain whether it was mischievous or not. I think that would be wilful misconduct."

In *Forder* v. *Great Western Railway Company*[2] Lord Alverstone C.J. at pages 535 and 536 said:

> "I am quite prepared to adopt, with one slight addition, the definition of wilful misconduct given by Johnson J. in *Graham* v. *Belfast and Northern Counties Ry. Co.* ([1901] 2 I.R. 13), where he says: 'Wilful misconduct in such a special condition means misconduct to which the will is party as contradistinguished from accident, and is far beyond any negligence, even gross or culpable negligence, and involves that a person wilfully misconducts himself who knows and appreciates that it is wrong conduct on his part in the existing circumstances to do, or to fail or omit to do (as the case may be), a particular thing, and yet intentionally does, or fails or omits to do it, or persists in the act, failure, or omission regardless of consequences.' The addition which I would suggest is, 'or acts with reckless carelessness, not caring what the results of his carelessness may be'."

In order to establish wilful misconduct, therefore, the court must be satisfied that the person who did the act knew that he was doing something wrong and yet did it notwithstanding that knowledge. or, alternatively,

that he did it quite recklessly not caring whether it was the right or wrong thing to do, quite regardless of the results of what he was doing.

Section 106 of the Evidence Ordinance, 1950 provides that the burden of proving any fact which is "especially within the knowledge of any person" is upon him and under section 114, Illustration (g), the court may presume "that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it." However, because he has specifically undertaken to do so the burden of proving wilful misconduct in a special condition relating to a contract of carriage "at owner's risk" is on the plaintiffs even though the matter is especially within the knowledge of the defendant and no adverse inference could therefore be made on the failure of the defendant to produce any evidence on it.

In *Forder* v. *Great Western Railway Company* where the plaintiff sent a parcel of sheepskins on the terms of an "owners' risk" note whereby he relieved the defendants from liability for damages except upon proof that it arose from wilful misconduct on the part of the defendants' servants Kennedy J. at page 536 said:

"By the terms of the consignment note the onus of proof, upon the issue whether the damage arose from wilful misconduct on the part of the company's servants, is cast upon the plaintiff."

In *H. C. Smith, Ltd.* v. *Great Western Railway Company*[3] it was held that the refusal of the defendants to account for the loss of the goods was not evidence which justified the court in inferring that the loss arose from the wilful misconduct of the defendant's servants and Lord Buckmaster said in the course of his judgment at page 183:

"The explanation of the loss is often within the exclusive knowledge of the railway company, and for the trader to be compelled to prove that it was due to wilful misconduct on the part of the railway company's servants, is to call upon him to establish something which it may be almost impossible for him to prove. None the less, that is the burden that he has undertaken, and the question is whether in this case he has afforded any evidence which calls for an answer on the part of the railway company."

The plaintiffs' assertions that the onions were perishable goods and that most of them had become rotten when they arrived at Pasir Mas because they had been sent by the slow goods train and that such train would even in normal circumstances take seven days or more to reach Pasir Mas from Bukit Tengah were not disputed and from the evidence produced by the plaintiffs it is in my view reasonable to infer that CG4243 had been taken from Bukit Tengah to Taiping by the fast goods train and that it had the usual green labels attached to its sides on which were stated that onions were carried therein and the date of loading with the word "perishable" embossed across them in black, that the defendants' servant at Taiping responsible for it had seen the labels and therefore knew that the CG had to be sent to Pasir Mas expeditiously by a fast goods train and that such a train was available on the day in question. P.W. 1's contention that he knew that onions carried in a sealed CG would rot after seven days had not been challenged when he was cross-examined and the defendants' contention in paragraph 3 of their letter at page 5 of A that their station staff "thought" that the onions could withstand the long journey by the slow goods train showed that the staff concerned was not certain whether he had done the right or the wrong thing.

In the surrounding circumstances of this case I find that wilful misconduct has been proved against the defendants' servant at Taiping when he forwarded CG 4243 containing the onions from Taiping by a slow goods train. I am satisfied that when he did so he had, at the least, acted recklessly, quite regardless of whether the onions would rot or not — that with an indifference to his duty he had not cared to ascertain whether what he did was the right or the wrong thing to do.

The amount of damages claimed has not been disputed and I therefore give judgment for the plaintiffs in the sum of $5,353 with interest at 6% on the sum of $4,840 from 17th February 1967 and costs.

Judgment for the plaintiff.

Solicitors: *Wilson & Co.; Skrine & Co.*

PUBLIC PROSECUTOR v. THE STRAITS TIMES (MALAYA) BHD.

[O.Cr.J. (Abdul Hamid J.) September 8, 1970]

[Kuala Lumpur — Criminal Application No. 18 of 1970]

Criminal Law and Procedure — Contempt of court — Application for writ of attachment for — Application ex parte — Whether proper procedure — R.S.C. 1957, O. 44, r. 2 — Courts of Judicature Act, 1964, s. 13.

This was an *ex parte* originating motion brought by the Public Prosecutor for an order that the applicant be at liberty to issue writ or writs of attachment against the respondents for alleged contempts of court.

Held: the proceeding by way of *ex parte* application for leave to issue a writ of attachment for contempt is not the proper procedure to be adopted. Notice of the application should be served on the respondents.

[Editorial Note: In pursuance to this order, the notice of application was duly served on the respondents and the matter came again before the same learned judge who after hearing the parties dismissed the application on October 9, 1970. That judgment is reported at page 67 *ante*. The judgment now reported was received by us subsequently.]

Cases referred to:-

(1) *In re H.E. Kingdon* v. *S.C. Goho* [1948] M.L.J. 17.

(2) *Re Run Run Shaw and Runme Shaw, ex parte Republic Pictures International Corporation* [1949] M.L.J. Supp. 16.

(3) *Public Prosecutor* v. *Abdul Samad* [1953] M.L.J. 118.

(4) *Public Prosecutor* v. *Straits Times Press Ltd.* [1949] M.L.J. 81.

Ex Parte ORIGINATING MOTION.

Mokhtar Sidin (Deputy Public Prosecutor) for the applicant.